

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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|-----------------------------|------------------------|
| INDUSTRIA DE ALIMENTOS ZENU | . |
| SAS, | . |
| | . |
| Plaintiff, | . |
| | . Case No. 16-cv-06576 |
| VS. | . |
| | . Newark, New Jersey |
| LATINFOOD U.S. CORP., | . March 21, 2019 |
| et al., | . |
| | . |
| Defendants. | . |

TRANSCRIPT OF TELEPHONIC CONFERENCE
BEFORE THE HONORABLE MICHAEL A. HAMMER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

| | |
|-------------------|--|
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1 (Commencement of proceedings at 12:16:07 P.M.)

2

3 THE COURT: All right this is Judge Hammer.
4 I'm on the -- we're on the record in this case it's
5 Industria De Alimentos v. Latinfood, Civil number
6 16-6576 because the apparently the parties could not
7 agree on -- in discussion with my law clerk whether we
8 needed to proceed on the record. So, in an abundance
9 of caution I decided best to proceed on the record
10 rather than have to do it twice. So, I can I have
11 appearances please beginning with plaintiff's counsel?

12 MR. KADOSH: Yes, Your Honor this is -- this
13 is Sam Kadosh from Reed Smith, I have my colleagues
14 Peter Raymond and Jeremy Berman on the line as well.

15 THE COURT: Okay, for the defense?

16 MR. INGBER: And Your Honor this is Mark
17 Ingber the attorney for defendant Latinfood U.S. Corp
18 and Wilson Zuluaga.

19 THE COURT: All right. So, I'm operating off
20 of -- I know that there was some recent discovery
21 disputes that I resolved. There was the one that was
22 resolved by way of the Court's February 7th order.
23 There was the deposition dispute, I think it was last
24 week that I resolved. Where are we with remaining
25 fact discovery, are we done at this point?

1 MR. KADOSH: Your Honor, so this is again Sam
2 Kadosh from Reed Smith. What has happened since we
3 last spoke is, we resolved the disputes related to the
4 document production between the parties. We conducted
5 two non-party depositions, one this week, one last
6 week. We also were able to obtain the dates for our
7 -- the 30(b)(6) deposition for our client Industria
8 and that somebody will -- from Columbia. And that is
9 for the week of April 8th. We provide that
10 information to Mr. Ingber this morning and he's going
11 to check with his client to see if that indeed works
12 for a deposition.

13 There are, I think, will be a deposition with
14 Mr. Zuluaga you know the defendant, -- of Latinfoods
15 and there may be one or two additional depositions. I
16 think we'll only know that after the 30(b)(6)
17 depositions are --

18 There's also just some follow up that we need
19 to do as a result of -- some follow up discovery that
20 we really need to do as a result of these depositions.
21 In the first deposition of a non-party we had
22 discovered through the deposition that that individual
23 had not searched many of -- individual did a lot of
24 business with Latinfoods for -- really some 60
25 documents.

1 THE COURT: I'm sorry, I didn't get that last
2 -- I didn't get the last part. What -- from the
3 deposition of the non-party -- can you repeat the
4 rest?

5 MR. KADOSH: Sure. We took the deposition of
6 non-party Sudat (phonetic) C-I-D-A-O, last week.

7 THE COURT: Okay.

8 MR. KADOSH: And this was a key non-party.
9 But that this non-party does business to this day with
10 Latinfood and was the counter party to some very
11 important emails, that were then shared with the Court
12 previously. And we had subpoenaed this non-party in
13 order to get the communications because Mr. Zuluaga
14 had allegedly deleted them. And we had received a few
15 of the emails, but not all of the emails.

16 THE COURT: Okay.

17 MR. KADOSH: And in the deposition of the
18 non-party last week it came out that the non-party had
19 not searched their email server, other computer, --

20 THE COURT: I got you.

21 MR. KADOSH: -- or backup hard drives, those.
22 We made the follow up request, we're hoping that that
23 would be able to be resolved, you know, --

24 THE COURT: Right.

25 MR. KADOSH: -- without any Court

1 intervention but that is something -- you know that is
2 something that may require the Court's help.

3 We had also sent out a subpoena to Network
4 Solution, which is an email provider. That was the
5 email provider for Latinfoods, and we did that after
6 the deposition. While we were waiting for the Court
7 on the call today, the defendants had -- the
8 defendants' counsel had indicated that he had some
9 problems with the subpoena. But this is the first
10 that we've heard about it. So, I'm not sure that
11 dispute is ripe for the court yet, because you know
12 we're really only hearing about the concerns about the
13 subpoena for the first time today.

14 THE COURT: Okay.

15 MR. INGBER: Your Honor --

16 THE COURT: Yeah.

17 MR. INGBER: This is Mark Ingber --

18 THE COURT: Wait, at risk before we run into
19 getting into -- whether I'm even going to consider any
20 dispute over the subpoena to the network provider, I'm
21 just trying to still first get my arms around where I
22 started, which was what other fact discovery is left
23 out there. Because at least -- unless I'm misreading
24 the docket, the most current scheduling order that we
25 had was the one that was entered in October of 2018

1 which had a fact discovery end date of December 24,
2 2018. Was it amended since then? And I'm not -- I'm
3 not asking that --

4 MR. KADOSH: Well Your Honor what's --

5 THE COURT: Understand that I'm not asking to
6 trip the parties up, it's just one of the things we
7 may need to accomplish today is another amended
8 scheduling order to account for what -- what's going
9 on in the case and the need for the additional
10 discovery, and a time frame that marries up to, you
11 know, the needs of the case.

12 MR. KADOSH: Your Honor so this is Sam --
13 what has happened at the last time that you set the
14 deadlines is there were extensive disputes between the
15 parties --

16 THE COURT: Right.

17 MR. KADOSH: -- about the scope of documents,
18 discovery and interrogatories. And you had said that
19 you first wanted the parties to resolve those disputes
20 before you --

21 THE COURT: And then we would revisit the
22 schedule, is that right?

23 MR. KADOSH: Exactly, that's correct Your
24 Honor.

25 THE COURT: That make sense.

1 MR. KADOSH: And so, one of the purposes of
2 the call today, I thought would be to revisit the
3 schedule and set some new deadlines.

4 THE COURT: Yes. All right, that's fine. I
5 just wanted to make sure. Is there other -- any other
6 outstanding fact discovery that we have not discussed
7 that still has to get done? No? Okay.

8 MR. KADOSH: -- Your Honor, there may be --
9 again this is Sam again. There was a deposition that
10 took place on Monday that related to defendants'
11 counterclaims. And his counterclaims are, you know,
12 one sentence that one of our subsidiary's employees in
13 2015 went around supermarkets in New Jersey and told
14 them to stop selling these products because they were
15 "fake." And so, we took the deposition of the
16 supermarket owner that was identified in the cross
17 complaints on Monday. He had identified maybe one or
18 two other supermarkets that were spoken to or alleged
19 spoken to, you know communicated the same message that
20 the products were fake.

21 So, we're just going to send out additional
22 requests to defendants to ask for the sale data for
23 those supermarkets because they weren't previously
24 identified as being an issue. And we'll also subpoena
25 the supermarkets for the sales data for -- you know,

1 just to see -- defendants' contention is that as a
2 result of these conversations the sales of those
3 stores stopped. So, we just want to ask that. So,
4 that's one other piece of information that we're going
5 to need to track down as a result of Monday's
6 deposition.

7 THE COURT: Well, are these other
8 supermarkets for which the defendant in the
9 counterclaim alleging damages?

10 MR. KADOSH: -- identify.

11 MR. INGBER: Your Honor we have alleged that
12 -- we have alleged one -- entity that we had alleged
13 that plaintiffs had -- employee interfered with -- at
14 the deposition this week we -- we believe we uncovered
15 additional one, that we -- two -- so we certainly --

16 THE COURT: Okay.

17 MR. INGBER: You know, we're trying to get a
18 handle on that and explore how many other parties. We
19 need -- obviously we need to depose individuals that,
20 from the plaintiff so that we should -- get this
21 information.

22 THE COURT: So, there's -- is -- I want to
23 make sure, just so I understand correctly. There's no
24 dispute between the parties about the relevance of
25 these other two supermarkets that the initial

1 supermarket owner who -- who was -- who testified the
2 other day identified.

3 MR. KADOSH: I think -- I think they're
4 clearly relevant.

5 THE COURT: Okay, well and the defense
6 apparently thinks so too since they're seeking the
7 deps.

8 MR. RAYMOND: And Your Honor this is Peter
9 Raymond and if I could just say to that, we -- we
10 don't know, this is sort of hearsay this guy said in
11 his deposition that he had heard that things have been
12 said to these other supermarkets, so we don't know
13 whether it's true or not. But we -- we both -- I
14 think both sides agree that if in fact it happened it
15 may be relevant. So, that's -- we're just exploring
16 that now.

17 THE COURT: Okay. All right. I see what
18 you're saying.

19 MR. INGBER: Your --

20 THE COURT: Yes?

21 MR. INGBER: -- this is Mark Ingber. So,
22 last year, Your Honor we had subpoenaed this witness
23 who was employed by defendants -- excuse me by --
24 defendants who -- as an individual by the name of
25 Alexandre Yepis (phonetic). And we gave -- the

1 manager for Cordialsa and we had heard through the
2 grapevine that he -- of the employees by -- by the
3 counter claimant -- counter defendant Cordialsa.

4 So, in any event we spoke to the dep -- this
5 -- this individual is very important because he's the
6 individual that was identified by the supermarket's
7 manager this week during his deposition as the person
8 -- into on behalf of Cordialsa on behalf of the --
9 defendants, that our client -- unauthorized and fake
10 and to remove them from the shelves. And he --
11 according to the witness Mr. Yepis was acting under
12 the order of Louis Harango (phonetic) who Cordialsa's
13 30(b)(6) witness and he has -- has identified two
14 additional -- at least two additional supermarkets
15 that Mr. Yepis mentioned.

16 So, we find out this morning that Mr. Yepis
17 is no longer with Cordialsa and we're hoping --
18 conversation with plaintiff's counsel which is going
19 to get the contact information, which will be very
20 helpful since he's a major witness in support of -- of
21 defendants' counterclaim for tortious interference.

22 So, if they produce -- if we can get his
23 contact info and depose him, you know, that will be
24 very -- somehow -- vanishing and nobody can find him,
25 that would -- obviously that would be a problem. You

1 know, because we believe that the plaintiffs had an
2 obligation to keep track of the whereabouts of the
3 note -- of the noted deponents.

4 THE COURT: Okay.

5 MR. RAYMOND: Your Honor, this is Peter
6 Raymond, just to comment on that. We -- we were asked
7 by Mr. Ingber if Mr. Yepis was still employed by us.
8 We found out just last night or this morning that he
9 was not. You know, it takes a little bit of time
10 because our client's in Columbia. They don't speak
11 English. We actually deal through their Colombian
12 counsel. And this is actually not them, this is a US
13 subsidiary. So, we put in the request. It took about
14 a week to get the response back, but we did just get
15 the response, he's no longer employed.

16 As we told Mr. Ingber this morning we
17 followed up with the client to ask if there -- what
18 their last contact information is for him, if they
19 know where he is. And as soon as we get that
20 information, we will pass that along to Mr. Ingber.
21 But at this point there's no indication of any, you
22 know, mis-deeds here. We just confirmed, you know,
23 that he's not employed by the subsidiary anymore and
24 will do our best to find out where he is and cooperate
25 in trying to depose him.

1 THE COURT: All right. All right.

2 MR. INGBER: And that -- that -- Your Honor,
3 you know if -- if we can -- if they -- if they can
4 give us the information and we can depose him well
5 then, it's not an issue.

6 THE COURT: Right.

7 MR. INGBER: I -- Your Honor's attention.

8 Secondly, Your Honor, the plaintiffs on March
9 15 emailed that they subpoena the production of
10 documents that they were currently serving on Network
11 Solutions, the documents to be produced by March 29,
12 2019 regarding Latinfoods domain name and my client's
13 corporate and individual client's emails associated
14 with it.

15 You know it's taken a -- to review this,
16 because we've never seen something like this. But we
17 believe the subpoena is -- as to request all account
18 statement or the data that any and all emails between
19 Latinfoods and Zuluaga we believe is in violation of
20 the Stored Communications Act, to request all metadata
21 of any and all email. We believe it's in violation
22 of the Electronic Communications Act by asking that
23 all metadata and email backups which could include --
24 personal and privilege communications. We also
25 believe that it could violate the attorney/client

1 privilege of the email metadata could include content
2 protected by the attorney/client privilege -- backups
3 of any emails can include attorney/client privilege.

4 So, we want to know -- and I discussed this
5 with -- I have discussed with opposing counsel right
6 beforehand -- we wanted to know whether Network
7 Solutions has responded or otherwise contacted
8 plaintiff's counsel in response to the subpoena. We
9 also want plaintiff's counsel to provide us with a
10 copy -- with the -- the -- information for the
11 pertinent network solutions. Or we can determine
12 whether -- whether Network Solutions will be
13 notifying -- and our client before and if they decide
14 to comply with the subpoena.

15 So, we want to also have a -- we want things
16 to be considered -- request a meet-and-confer to
17 discuss the foregoing.

18 MR. KADOSH: Your Honor this is Sam Kadosh
19 again, as I mentioned previously --

20 THE COURT: Yes.

21 MR. KADOSH: -- the subpoena was served a
22 week ago. This is literally when we got on the call
23 to call the Court, while we were waiting for the
24 Court, I asked Mr. Ingber so are there any -- you know
25 I think this is a pretty quick call -- to discuss.

1 And he raised the issue of the subpoena.

2 So, I don't think the dispute is ripe yet. I
3 would -- appropriate -- particularly because so much
4 of this case is about document destruction and alleged
5 document destruction. And part of what the subpoena
6 seeks from Network Solutions is their record as to,
7 you know, when emails were deleted, when there were
8 changes to the auto deletion policy. But you know --
9 you know we don't think this dispute is ripe. If and
10 when it is, we're happy to brief it or -- anything
11 that the Court wants.

12 THE COURT: Well, I do think though Mr.
13 Ingber's concern is that given that the deadline for
14 compliance with the subpoena is only eight days away,
15 how does he have any assurances as he stands here now
16 that in the interim while you folks are meeting-and-
17 conferring and if necessary the Court resolves a
18 motion to quash, because that's not been filed with
19 me, the documents aren't turned -- the responsive
20 documents aren't turned over in the interim?

21 MR. KADOSH: Your Honor the -- you know
22 again, this is the first time that we're hearing about
23 it.

24 THE COURT: I understand.

25 MR. KADOSH: We could have a meet-and-confer

1 --

2 THE COURT: I Also think there's an easy
3 cure.

4 MR. KADOSH: -- today or tomorrow, you know
5 if he feels -- if he feels like there's an urgency
6 here, let's meet-and-confer tomorrow and we can bring
7 it to the Court's attention next week.

8 THE COURT: Well, let me make clear -- hold
9 on let me make clear.

10 MR. KADOSH: Yeah.

11 THE COURT: As much as I would like for this
12 to be my only case so that I can be on standby for any
13 discovery dispute that may pop up and provide 24-hour
14 relief I'm not going to likely be in a position to do
15 that. Here's what I suggest.

16 One, let me make clear I'm aware of, because
17 it's been brewing on for going on now, at least a year
18 and a half. If my records are correct, they show that
19 I became of this spoliation issue back in or around
20 October of 2017. And to the extent that the subpoena
21 request seeks information relevant to the spoliation
22 issue, that may be discoverable material under Rule
23 26.

24 I know Mr. Ingber raise, among other things,
25 the Stored Communications Act. My understanding, and

1 I've written on the Stored Communications Act before,
2 is that that may restrict the government. I don't
3 know though the extent to which that restricts
4 discovery of metadata in private civil litigation
5 where the Court is to determine that the data is
6 relevant and discoverable under Rule 26.

7 On the other hand, I do see point that
8 depending on the fruits of that subpoena response and
9 depending on the scope of the subpoena -- obviously I
10 have not seen the subpoena, it could raise issues of
11 privilege communications. If, for example, the fruits
12 of that subpoena response included communications or
13 even metadata about communications between Mr. Ingber
14 and his client.

15 I would strongly suggest that we -- you folks
16 do the following. When we get off the phone work out
17 a schedule for the parties to meet-and-confer. And as
18 well a deadline by which the parties will agree that
19 if they haven't resolved it through the meet-and-
20 confer process then Mr. Ingber may make a motion to
21 quash the subpoena with the Court. The defense --
22 Industria would have obviously the opportunity to
23 respond.

24 In the interim Network Solutions be advised
25 not to produce the fruits of the subpoena response

1 until either you folks through the meet-and-confer
2 process have resolved the issue, or if necessary, the
3 Court has resolved this issue.

4 That gives --

5 MR. KADOSH: Yeah, that's acceptable to
6 plaintiff.

7 MR. INGBER: That's acceptable to defendants
8 Your Honor. Thank you for that suggestion.

9 THE COURT: All right. So, why don't we do
10 this on that front. When you folks get off the phone
11 -- or when I get off the phone you folks continue to
12 discuss at least the time frame. And again, that time
13 frame should include two things: One, enough time for
14 the parties to meet-and-confer; Two, if necessary, a
15 briefing schedule.

16 Honestly, it seems to me that putting aside
17 potential privilege -- and the -- even the risk of
18 privilege could be carved out of this.

19 MR. KADOSH: Right.

20 THE COURT: Such that Network Solutions is
21 not obligated to produce any information or concerning
22 any communications that would include Mr. Ingber or
23 his law firm or any agents of the law firm in
24 conjunction with the litigation. But that the parties
25 meet-and-confer on what's reasonably necessary under

1 the subpoena given the spoliation issue.

2 Honestly, I'm not sure that I understand --
3 well, you know what I'm not going to go into that area
4 because I haven't seen the subpoena. But recognizing
5 that vis-a-vis the spoliation -- some of this
6 information very well may be relevant and discoverable
7 under Rule 26. And keep in mind too that some of this
8 may actually help thwart -- not thwart, obviate the
9 need for complicated and expensive spoliation motion
10 practice later, which would probably portend a very
11 uncertain result from both sides under Rule 37.

12 So, what I would suggest is that by --
13 today's a Thursday? So, by Monday you folks give me a
14 joint proposed order that includes the deadlines for
15 the meet-and-confer, includes the deadlines for any
16 necessary motion practice and that includes
17 confirmation that counsel has alerted Network
18 Solutions to hold off on complying with the subpoena
19 pending further order of the Court. How's that?

20 That gives us a rational approach. That
21 gives you folks the -- the space and probably, I
22 guess, to some extent Mr. Ingber the comfort level of
23 having a meaningful meet-and-confer that may very well
24 obviate a lot of these issues, without worrying about
25 an inadvertent interim production where Network

1 Solutions is just trying not to run afoul of this
2 subpoena. But also gives the plaintiff the comfort of
3 knowing that it's going to have recourse if the
4 parties can't resolve this in the meet-and-confer.

5 And then include in there the proposed -- the
6 proposed order the proposed briefing schedule. And I
7 would also include -- because some of this may turn on
8 that, a proposed end -- or proposed amended deadlines
9 for fact discovery, expert reports and the completion
10 of expert discovery. Because clearly in light of the
11 depositions that are going on, not really including
12 the spoliation issue, our current structure, as we
13 discussed earlier, needs to be amended.

14 MR. INGBER: Your Honor?

15 THE COURT: Yes.

16 MR. INGBER: This is Mark Ingber, a couple of
17 things. In connection with getting back to you by
18 Monday, I'm going to be in -- in a -- attending a
19 conference in Washington DC on Monday and Tuesday.

20 THE COURT: Okay.

21 MR. INGBER: So, I will not be --

22 THE COURT: How about the end of the week?

23 MR. INGBER: -- in the --

24 THE COURT: How about -- how about a week
25 from tomorrow?

1 MR. INGBER: By the end of the week --

2 THE COURT: In other words --

3 MR. INGBER: That would be better.

4 THE COURT: All right, fine.

5 MR. INGBER: And -- go -- just so you're
6 aware, but we -- we had initially noticed multiple
7 witnesses for focus based on the -- that we had
8 received. But we did agree, Your Honor, that we -- we
9 would be begin with the 30(b)(6) for the each of
10 Industria and Cordialsa and at that point we would
11 determine -- the defendants would -- would determine
12 what we needed additional witnesses. So, we -- we
13 think that to go through with that in good faith that
14 there's a -- there's a reasonable likelihood that
15 further depositions of the plaintiff will be needed
16 besides their 30(b)(6) initial witness.

17 THE COURT: Okay. Is everybody onboard for
18 the proposed schedule that I just laid out?

19 MR. KADOSH: Yes, Your Honor this is Sam
20 Kadosh and we're onboard with all -- all of it. With
21 just one caveat, which is at the prior conference we
22 had contemplated that we would complete fact discovery
23 when -- the -- the spoliation motion and then only
24 then after that engage in expert discovery. With the
25 idea being that the -- the outcome of the spoliation

1 motion would really, you know, give the party insight
2 into the scope of the case going forward, before we
3 engage in like another very costly step in the
4 process, you know, of retaining the experts and doing
5 surveys and deposing the experts. That we would
6 first, you know, see the outcome of the spoliation
7 motion.

8 MR. INGBER: Well, Your Honor, this is Mark
9 Ingber. I do recall a discussion about resolving the
10 issue of -- of the -- if it still was necessary of any
11 issue regarding the potential or -- spoliation before
12 moving forward with expert witness. But, you know,
13 other than that there was nothing about a particular
14 schedule of trying to bring a spoliation motion was to
15 be considered after the close of discovery.

16 MR. RAYMOND: Your Honor -- Your Honor this
17 is Peter Raymond. If I could just comment on that.
18 What actually happened here, and maybe people aren't
19 remembering. But we -- we made a motion before -- for
20 permission to make this spoliation motion now. And
21 Your Honor ruled in response to that that we could not
22 make it then, but that we could make a motion at the
23 end of fact discovery, but before expert discovery.

24 So, that is in the record and that is a
25 ruling that Your Honor made. So, it wasn't --

1 THE COURT: Hold on.

2 MR. RAYMOND: -- a discussion.

3 THE COURT: Hold on, let me pull up --

4 MR. INGBER: Well the other -- Your Honor --
5 made a ruling -- that ruling -- plaintiff's -- bring a
6 second frivolous motion for reconsideration of -- of
7 spoliation.

8 MR. RAYMOND: No, it was on that second
9 motion that Your Honor made that ruling, so it was in
10 response to that second motion. So, it's in the
11 record. I don't have it in front of me right now, but
12 Your Honor did make that ruling. So, we'll -- we can
13 work that into the schedule that we're going to
14 propose to you.

15 MR. INGBER: Well, I -- I don't believe it
16 belongs in a -- in a -- in a discovery schedule,
17 frankly.

18 MR. RAYMOND: Well --

19 THE COURT: Hold on. Before --

20 MR. RAYMOND: -- it was a rule of the Court.

21 THE COURT: Let's allow the Court the
22 opportunity to pull up the actual order.

23 (Pause in proceedings)

24 THE COURT: Sorry, just give me a moment
25 because there's a lot of docket here.

1 MR. INGBER: This is -- this is in the -- the
2 docket number 131, Your Honor.

3 THE COURT: Actually it's 103, because 131
4 incorporates 103, the May 7, 2018 order, I think. I
5 think.

6 MR. INGBER: Right. That's correct Your
7 Honor.

8 THE COURT: All right. What the order held
9 was that plaintiff's application to stay remaining
10 discovery pending adjudication of the sanctions motion
11 is denied. Plaintiff could file any such motion at
12 the close of discovery, in conjunction with
13 dispositive motions. The Court never held -- this why
14 it struck me as unlikely when I first heard it. The
15 Court never held that expert discovery was going to be
16 stayed. That's not in either the May 8, 2018 Order,
17 nor the -- oh, and I just had it. What was the -- Mr.
18 Ingber what was the order you just cited?

19 MR. INGBER: August 31, Your Honor, December
20 4.

21 THE COURT: Yeah. Yeah. Which essentially
22 incorporated --

23 MR. INGBER: 12-18.

24 THE COURT: -- re-incorporated the May 7,
25 2018 Order. In other words --

1 MR. RAYMOND: Well, Your Honor can we check
2 the transcript then, because I know Your Honor said
3 that. I just don't want to -- I don't have those in
4 front of me right here. But Your Honor said that in
5 our discussion about motion.

6 THE COURT: Well, you're certainly free to
7 check the transcript --

8 MR. INGBER: -- are not in the final order
9 unless they're there.

10 THE COURT: Exactly. It's -- it's what's
11 reduced to the order, for which no party ever sought
12 reconsideration or appeal that actually matters.

13 Look, here's -- here's my core concern, okay.
14 Particularly because I ordered that the sanctions
15 motion would be part and parcel of the dispositive
16 motion. It's going to probably take -- in this case
17 it is already approaching the three-year mark. It's
18 already going to take probably three months or so for
19 full briefing on those motions. It very well may take
20 another five to six months for adjudication of those
21 motions. In a case that's rapidly approaching the
22 three-year mark and given all of the things that
23 counsel still has to do just to get fact discovery
24 done, I am loath to, just essentially give a blank
25 check on when exactly expert discovery begins.

1 I -- I also am not sure that I understand,
2 given that the spoliation motion is going to be part
3 and parcel of the dispositive motion, I'm not sure why
4 it would make sense to hold off on expert discovery
5 pending adjudication of the -- the dispositive motions
6 any spoliation motion.

7 Now, you could argue that, well if we the
8 defendants win, for example, on summary judgment that
9 would have the effect of mooted expert discovery.
10 And to some extent there's an irrefutable logic to
11 that. But that is -- there's nothing about that
12 that's unusual or extraordinary. That's always a risk
13 when there's a dispositive motion pending. And this
14 court, when faced with applications to stay discovery
15 has routinely required more of a showing than that.
16 That's my concern in a nutshell.

17 MR. RAYMOND: All right, Your Honor we will
18 present a -- a schedule as you -- as you have asked us
19 to do. I mean I know we didn't discuss this before
20 and I guess it's in the transcript, maybe it didn't
21 make it into the order. But, you know, we were trying
22 to -- permission to make that motion sooner rather
23 than later. And Your Honor, I thought, sort of
24 compromised and said, yeah you can make it at the end
25 of fact discovery, but before expert discovery.

1 So, I know there was a discussion about it
2 and it should be in the transcript. Obviously, it's
3 up to Your Honor to decide how you want to proceed.
4 But, you know, the spoliation motion is -- you know,
5 it's a very serious motion in this case.

6 THE COURT: Uh huh.

7 MR. RAYMOND: You know a spoliation has
8 caused us to not -- to not be able to get much
9 discovery. In fact --

10 THE COURT: Right, but Peter remember --
11 remember too -- because this part I do remember.
12 Remember --

13 MR. RAYMOND: Your Honor, I have the
14 transcript --

15 THE COURT: Hold on.

16 MR. RAYMOND: I'm sorry.

17 THE COURT: As we've just established, the
18 transcript while I guess providing some insight is
19 certainly not dispositive of the docketed order.

20 The -- the idea behind holding off on the
21 spoliation motion until dispositive motions was this.
22 It was that there was a real -- at least a possibility
23 that other discovery that the parties could educe
24 would possibly obviate the need for the spoliation
25 motion by finding that there were alternative sources

1 of the same or substantially similar information. And
2 at that point we just didn't know.

3 So, at least -- if I recall correctly, my
4 thinking was, that let's get the rest of discovery
5 done. When we have a much clearer pictures of what
6 prejudice the plaintiff could argue as a result of the
7 spoliated information. But none of that necessarily
8 portends one way or the other for -- favorably for
9 holding off on expert discovery.

10 MR. RAYMOND: Your Honor, I just pulled the
11 transcript, for what it's worth at page seven you --
12 you stated, "What I will offer is this. I will stay
13 any expert discovery on damages to let you make that
14 motion and get a ruling on that motion before the
15 parties have to go through the time and expense of any
16 expert damages. But beyond that discovery will
17 continue and the Courts May -- Order stands."

18 So, it's correct we didn't then try to
19 cooperate that specifically into the order that you
20 issued, but we thought Your Honor's ruling was quite
21 clear that -- that we could avoid the expense of
22 expert discovery at least until --

23 THE COURT: And that was when?

24 MR. RAYMOND: -- the decision.

25 THE COURT: Which transcript --

1 MR. RAYMOND: That was December 4, 2018,
2 teleconference Your Honor.

3 MR. INGBER: They -- hearing this issue.
4 This is the same -- plaintiff's counsel -- first order
5 said they they're not to bring up spoliation at this
6 time and wasted everybody else's time on this.

7 So, it -- whatever the order said -- as Your
8 Honor indicated -- dispositive -- move to reconsider
9 it. So, you know as far as the defendants are
10 concerned there's -- there's a lot more to do.

11 MR. RAYMOND: Well, Your Honor --
12 inconsistent with what you said in the transcript. It
13 doesn't --

14 THE COURT: Yes, making it -- counsel making
15 it incumbent upon you then to seek reconsideration or
16 appeal.

17 Look, let's take a practical view of this.
18 This case is, as I said, is two plus years old. I
19 still haven't heard a reason why the expert discovery
20 should await result of the dispositive motions and the
21 spoliation motion.

22 MR. RAYMOND: Your Honor, again Peter
23 Raymond. The answer to that is that expert discovery
24 in this, as in other trademark cases, will likely
25 including doing consumer perception surveys, which you

1 know can cost up to \$100,000 to do. That's not
2 including the depositions that each side may want to
3 take of the experts. So, there's a very substantial
4 expense in that -- in that piece of expert -- of
5 expert work and discovery.

6 So, I think the thinking was at the December
7 8th conference was that we could hold off on the
8 parties taking on that very substantial expense
9 until there was ruling on the -- on the spoliation
10 motion.

11 MR. INGBER: Your Honor, this is plaintiff --
12 excuse me defendant counsel. If -- time Your Honor
13 the parties are entered into a stipulation whereby
14 Industria has -- has stipulated that they never used
15 the mark Zenu -- of any goods imported by Industria in
16 to the U.S. That they've never sold any goods in the
17 U.S. They never sold any goods bearing the mark Zenu
18 -- in the US.

19 THE COURT: Uh huh.

20 MR. INGBER: So, I can't imagine what the
21 consumer study is going to find. The witness this
22 week, Mr. Rodriguez from -- said he never heard of
23 Industria.

24 THE COURT: Uh huh.

25 MR. INGBER: So, this is the subsequent

1 factors which -- which would further indicate that if
2 any expert discovery on -- on a survey -- on -- on the
3 plaintiff's recognition in the US would be frivolous.

4 THE COURT: Uh huh. All right, look --

5 MR. RAYMOND: Your Honor -- the not -- what
6 the -- what the survey would hopefully show is that
7 Columbian American ex patriots in the United States
8 who are, you know, many of the customers of Latinfoods
9 believed that they are buying products imported by my
10 client from Columbia.

11 And in fact, in the non-party deposition of
12 the Cidao Meats, which was taken in the last two
13 weeks, Cidao's principal said that she was
14 specifically asked by Mr. Zuluaga of Latinfoods to
15 copy our trademark and our design for my client's
16 website in -- that one was the woman who created the
17 packaging for Latinfoods. So, --

18 MR. INGBER: -- that -- Your Honor --

19 MR. RAYMOND: -- finish --

20 MR. INGBER: -- wasn't there for the entire
21 deposition.

22 THE COURT: All right, look counsel --
23 counsel, let's do this. Because I want to be fair.
24 And also -- practical -- look cases -- the other
25 things is cases change over time. I certainly don't

1 know -- and that -- that transcript actually goes on
2 for like another, I don't know, nearly 20 pages. So,
3 -- and it resulted in the order that it resulted in.

4 I also did not know then when I know now,
5 which is that not only are we not going to meet the
6 December 24, discovery deadline that we are going
7 probably to go for at least another three months. So,
8 at least into mid-June, before we can safely say that
9 discovery is wrapped up. And it very well may go
10 longer if the parties don't resolve this subpoena
11 issue.

12 What I will say is this. If the defense
13 wants to renew an application to stay discovery
14 pending the spoliation motion and the dispositive
15 motions, you can send me a letter that lays out the
16 basis why and then Mr. Ingber can respond. Based on
17 everything we know, including now.

18 But keep in mind that if the best the
19 defendants have is, essentially off-the-cuff comment
20 during a long and rather contentious hearing that did
21 not, at the end of the -- certainly in the order
22 didn't embody it, where nobody sought reconsideration
23 or appeal, and really even as I go through the rest of
24 the transcript -- now I'm doing this on the fly
25 because we're in the middle of the phone conference.

1 You know, frankly, you're going to be fighting an
2 uphill battle, unless you've got a better -- more
3 substantive argument as to why now, knowing what we
4 know about the length of discovery and the remaining
5 discovery to be done it make sense to hold off on
6 experts depending adjudication of the summary judgment
7 and dispositive motions. You can make that -- that --
8 that argument. And I'll certainly hear in response
9 from Mr. Ingber.

10 MR. INGBER: Your Honor I think you mean --

11 THE COURT: All right.

12 MR. INGBER: -- the -- the plaintiff's
13 counsel, not defendants' counsel in your -- in your --

14 THE COURT: Sorry if I misspoke, I meant --
15 it's obviously the plaintiffs who are -- who are
16 raising this issue. Right. And Mr. Ingber can
17 respond.

18 All right.

19 MR. INGBER: Thank you Your Honor.

20 THE COURT: So, you folks are going to get me
21 that schedule. And I'm still going to want, at least
22 in that schedule, proposed deadlines. And then if the
23 defendants want to renew that application, I'll leave
24 that to you, and we'll deal with that at the
25 appropriate time. All right.

1 MR. INGBER: Thank Your Honor.

2 MR. RAYMOND: Thank Your Honor.

3 THE COURT: All right, thank you counsel,
4 we're adjourned.

5

6 (Conclusion of proceedings at 12:58:40 P.M.)

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